IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23338 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABHISHEK FASHIONS PVT. LTD & 1 - Petitioner(s)
Versus
UNION OF INDIA - Respondent(s)

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Appearance :
MR RAMNANDAN SINGH for Petitioner(s) : 1 - 2.
DS AFF.NOT FILED (N) for Respondent(s) : 1,
MR JITENDRA MALKAN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1.Rule. Mr. Jitendra Malkan, learned counsel for the respondents waives service of rule.

2.By this petition, under Article 226 of the Constitution of India, the petitioner prays that the forcible collection of 13 cheques on 15th April 2005 by the respondent from the petitioner be quashed and set aside. The petitioner further seeks direction against the respondent to return the dishonoured and undeposited cheques as well as to refund Rs.2,00,000/- to the petitioner, which had been recovered in violation of provisions of Section 11A of the Central Excise Act, 1944 (the Act).

3.The petitioner No.1 is a company, registered under the Companies' Act, 1956 and is engaged in the business of doing job work by collecting

raw material from different sources and printing of manmade fabrics.

4. It is averred in the petition that a summons dated 7th March 2005 was received by the petitioner, in relation to an inquiry against one M/s. Kashish Synthetics in relation to alleged evasion of Central Excise Duties in contravention of provisions of the Act and the Rules framed thereunder. Subsequently, further summons dated 17th March 2005 and 22nd March 2005 were issued against the petitioner, both pertaining to the inquiry against M/s. Kashish Synthetics. It is averred that another summons dated 12th April 2005 came to be issued against the petitioner in relation to inquiry against a firm namely M/s. Ruby Silk Mills, directing the petitioner No.2 to remain present with documents on 15th April 2005.

5. It is submitted by the petitioner, that on 15th

April 2005, the petitioner was compelled to deliver cheques of Rs.12,39,249/- by alleging that petitioner No.1 company was involved in availment of fraudulent CENVAT credit on the basis of fake Central Excise Invoices. It is contended that the petitioner was compelled to tender the aforesaid cheques, despite the fact that no notice under Section 11A of the Act had been issued against the petitioner. It is submitted that out of 13 cheques which were recovered from the petitioner, two cheques drawn on Sachin Industrial Co-Operative Bank Limited came to be cleared. That, the petitioner had submitted an application dated 02nd June 2005 to the concerned bank for “Stop Payment” of other cheques. It is this action of the respondent, of compelling the petitioner to tender cheques without issuance of show cause notice under Section 11A of the Act, which is subject matter of challenge in this petition.

6.Heard Mr.Ramnandan Singh and Mr. Jitendra Malkan, learned Advocates for the petitioners and respondent respectively. It is an admitted position, that by an order dated 06th May 2005 in the case of Century Dyeing and Printing Mills V/s. Union of India in Special Civil Application No.3983 of 2005, this Court had decided a similar controversy.

7.In response to the notice issued by this Court, the Assistant Commissioner (Preventive), Head Quarter Surat-I has filed Affidavit-in-Reply stating that the petitioner has voluntarily deposited post dated cheques in advance along with TR-6 challans (towards return of the amount of duty) before issuance of show cause notice so as to avoid the departmental penal provisions and also to reduce interest burden. It is further submitted that no recovery has been initiated by the department against the

petitioner. It is stated that the petitioner has given the cheques voluntarily, and that the department is not bypassing the provision of Section 11A of the Act. It is admitted that no show cause notice has been issued by the department in relation to 15 invoices, and that investigation is in progress.

8.On going through the averments made in Paragraph No. 3.2 of the Affidavit-in-Reply, it is apparent that fraudulent practice, if any, is ascribed to M/s. Ruby Silk Mills and M/s. Kashish Synthetics. The charge against the petitioner appears to be that of abetment. In Paragraph No. 3.10 of the Affidavit-in-Reply, the alleged fraudulent practice is ascribed to M/s. Alka Fashions. It is stated that investigation is still in progress. In the circumstances, a liability which might be likely to be fastened on the aforesaid firms namely M/s. Ruby Silk Mills, M/s. Kashish

Synthetics and M/s. Alka Fashions at some future point of time can in no circumstance be said to be a liability which is payable in praesenti. If that be so, the petitioner firm cannot be saddled with such liability in connection with transactions regarding which inquiry is yet going on.

9. In absence of any statutory provision on the basis of which any such recovery can be made, the action of the respondent authorities in collecting the cheques from the petitioner cannot be sustained in law. The position in law is well settled that liability to excise duty can arise on the production/manufacture of the excisable goods or at best on removal of such excisable goods. In the present case, the respondent authorities have failed to show any such taxing event having taken place on the basis of which they would be entitled to effect such recovery. Any tax or duty can only be

levied and collected in accordance with law, namely, backed by and supported by appropriate provision empowering the authority to undertake such an exercise of levy and collection. The respondent authorities must bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are granted to them by the statute and there are no powers dehors the statute. Therefore, the authorities are bound to act as provided by the provisions under which they can exercise such powers. The revenue is not an organization which is entitled to retain money without sanction of law. Therefore, without entering into the controversy as to whether payment was voluntary or otherwise, in absence of any statutory backing, the funds recovered by the respondent authorities by way of various cheques collected by them, cannot be permitted to be retained and are required to be refunded forthwith. The learned counsel for Revenue has

failed to point out a provision which empowers the authorities to collect and retain cheques in this manner.

10.Needless to state that this action, namely, of refunding the amount, will not entitle the petitioner to contend that it is absolved on merits, in case at the end of inquiry and adjudication process, it is found that the petitioner becomes liable to pay duty in accordance with law. It is further made clear that the respondent authorities are entitled to proceed with the inquiries which are already in progress and if necessary and deemed fit, issue show cause notice to the petitioner in accordance with law; thereafter pass an order of adjudication in accordance with law after hearing the petitioner.

11.In the result, the action of the respondent in collecting various cheques for various amounts

is not sustainable in law and is accordingly quashed. The respondent is directed to refund the sum of Rs.2,00,000/- recovered by way of encashment of two cheques forthwith, on or before 31st January 2006, without waiting for a certified copy of the order or a writ of this Court. Similarly, the respondent is also directed to return the unencashed 11 cheques held by them.

12.The petition is, accordingly, allowed. Rule made absolute. There shall be no order as to costs.

(D.A.MEHTA,J.)

(H.N.DEVANI,J.)

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